

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own)	
motion, seeking to establish an interim)	
policy on eligible telecommunications)	Application No. C-3415
carrier standards)	

**COMMENTS OF N.E. COLORADO CELLULAR, INC.
d/b/a VIAERO WIRELESS**

N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless (“Viaero”), by counsel and pursuant to the Order of the Nebraska Public Service Commission (the “Commission”) Opening Docket, dated May 4, 2005 (“Order Opening Docket”), hereby files comments in the above-captioned proceeding.

I. Introduction

Viaero is a provider of commercial mobile radio service (“CMRS”) in Colorado and Nebraska. Viaero has been designated an Eligible Telecommunications Carrier (“ETC”) in Colorado and has applied for ETC status in Nebraska.¹ Over the past three years, Viaero has had significant experience complying with the Colorado rules for ETCs. Through the Alliance of Rural CMRS Carriers and the Rural Cellular Association, Viaero participated in the FCC’s ongoing rulemaking that led to its recent March 17 *Report and Order* that was the impetus for this proceeding.²

Viaero has expressed its support for the Commission’s ongoing efforts to consider whether it is appropriate to adopt the ETC designation and certification standards set

¹ See Application No. C-3324 (filed Dec. 23, 2004).

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 05-46, *Report and Order* (rel. March 17, 2005) (“*FCC ETC Order*”).

forth in the *FCC ETC Order*.³ Viaero has provided its comments on the substance of the various proposed rules, and Viaero continues to believe that the Commission has taken the correct approach by opening a rulemaking proceeding.⁴ However, Viaero cannot support the Commission's attempts to create a parallel process whereby new "interim" guidelines (the "Interim Guidelines") may be adopted, presumably on an expedited basis, and applied to petitions already on file. The process begun in the Order Opening Docket represents an improper circumvention of the rulemaking process that ignores the FCC's decision not to apply the new requirements to pending ETC petitions as a condition of designation. Moreover, it would establish the presumptive validity of the Interim Guidelines, thus compromising the effectiveness of the Commission's rulemaking process.

For the reasons set forth below, Viaero urges the Commission to terminate this proceeding and limit its consideration of new standards to the rulemaking that is currently underway.

II. The Commission Should Abandon its "Interim" Efforts in Light of the FCC's Decision Not to Impose New Requirements On Carriers With Pending Petitions for ETC Designation

Although this Commission has adjudged the standards adopted in the *FCC ETC Order* to be "reasonable and useful," it has ignored one key aspect of the FCC's order. Specifically, the FCC declined to require currently pending ETC petitioners to make the showings required in the *FCC ETC Order*, including the filing of a five-year plan, as a condition of designation. Instead, the FCC held that existing ETCs and carriers with

³ See *In the Matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 5, Telecommunications Rules and Regulations, to add rules for designating eligible telecommunications carriers in Nebraska for the purpose of receiving federal universal service support*, Rule and Regulation No. 165, Order Opening Docket and Seeking Comment (entered April 26, 2005).

⁴ Viaero filed comments on the proposed rules on May 27, 2005.

pending ETC petitions shall have until October 1, 2006, to make the required filings. *See* newly adopted 47 C.F.R. § 54.202(b). While the new requirements will be applicable to all ETCs regardless of the date of designation, existing and pending ETCs are being provided a reasonable time to evaluate their ability to comply with the new rules and develop network build-out and other plans for presentation to the FCC.

The Interim Guidelines, in contrast, give existing ETCs until October 1, 2006, but make no mention of carriers with pending petitions for ETC designation. This critical omission would make the Interim Guidelines adopted in this proceeding immediately binding on carriers with pending petitions before the Commission for ETC designation. This would be unfair to carriers, such as Viaero, that filed their petitions before the Interim Guidelines were adopted or even proposed.

Instead, pending petitions should be processed under existing rules and standards, and any rules that are subsequently adopted in the rulemaking proceeding should be applied to all ETCs. Like a judge, an administrative agency has an obligation to decide an adjudicated matter under the law currently applicable. *See AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). While agencies may issue guidelines or interpretive rules without engaging in a notice-and-comment rulemaking, the Administrative Procedure Act requires a rulemaking proceeding if the agency action adopts a “new position inconsistent with . . . existing regulations.” *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 88 (1985). Where an agency “changes the rules of the game . . . more than a clarification has occurred.” *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

Given that the FCC’s rules (1) are not binding on this Commission; (2) have not yet become effective; and (3) will not require compliance by carriers with currently

pending ETC petitions until October 1, 2006, it would scarcely make sense to adopt them as Interim Guidelines immediately binding on current petitioners before this Commission. Whatever the designation requirements ultimately adopted in this proceeding or the companion rulemaking proceeding, the Commission should provide carriers with pending ETC petitions the same amount of time as previously designated ETCs to make the requisite compliance filings. Accordingly, Viaero urges the Commission to track the FCC's corresponding language so that Proposed Guideline No. 5 reads as follows:

Any common carrier that has been designated by this Commission as an eligible telecommunications carrier, or that has submitted its application for designation under Section 214(e)(2) before the effective date of these rules, must submit the information required by [paragraphs 2(f) and (g)] of this section no later than October 1, 2006.

III. The Adoption of Interim Guidelines Would Jeopardize the Rulemaking Process That Is Now Underway

It is unclear to Viaero whether the Commission envisions different procedures for the adoption of Interim Guidelines as opposed to the adoption of final rules, and the Commission's Order Opening Docket provides no guidance on this point. Logically, however, the use of the word "interim" suggests that the resulting guidelines will be adopted with greater speed and simplicity than rules. The Commission is considering precisely the same requirements in a separate rulemaking, and Viaero supports those efforts as an appropriate response to the *FCC ETC Order*. However, it seems that the primary purpose of the Interim Guidelines would be to circumvent normal rulemaking processes to ensure that new standards are adopted in time to be applied to petitions now pending before the Commission. Apart from the legality and fairness concerns set forth

in Section II above, a hasty decision to adopt Interim Guidelines could jeopardize the process for creating more permanent rules.

If the Commission adopts the Interim Guidelines pursuant to some expedited schedule that limits the public participation and deliberation associated with the adoption of rules, the Commission's ongoing rulemaking proceeding will be compromised. The Interim Guidelines, while purportedly temporary, would become integral to the ETC application process, and ETC petitioners would immediately begin developing policies, technical standards, and network planning with a view toward meeting those requirements. There would consequently be a natural disinclination by the Commission, and even many commenters, to upset the regime that is already in place. Public debate would likely be less than vigorous because the process would amount to essentially an up or down vote on an incumbent system rather than a careful weighing of different proposals and counterproposals. Accordingly, any procedural deficiencies in adopting the Interim Guidelines would not be cured by the presumably more thorough airing of issues that will occur in the rulemaking proceeding.

IV. Conclusion

For the foregoing reasons, Viaero urges the Commission to terminate this docket and limit its consideration of new standards to the rulemaking that is currently underway.

Respectfully submitted this 6th day of June, 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing Comments to be filed by electronic delivery and an original and five (5) paper copies to be filed by hand delivery on this 6th day of June, 2005, to the following:

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